BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF CH_2O, INC., Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB Nos. 84-182 and 85-66 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeals of a regulatory order (DE 84-416) and a $10,000 civil penalty (DE 84-415) relating to a spill of extremely hazardous wastes occurring in mid-March of 1984, came on for formal hearing before the Pollution Control Hearings Board; Lawrence J. Faulk (presiding), Wick Dufford and Gayle Rothrock at Lacey, Washington, on August 27, 1985. Janet Neer of Robert Lewis & Associates of Tacoma officially reported the proceedings. The appeals were consolidated for the hearing.

Appellant company was represented by Stephen H. Bean, attorney at

law. Respondent Washington State Department of Ecology was represented by Assistant Attorney General Leslie Nellermoe.

Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard. From the testimony, evidence, and contentions of the parties, the Board makes these

FINDINGS OF FACT

I

CH_2O is a Washington corporation doing business in Thurston County, Washington. CH_2O, Inc., operates a water treatment, chemical manufacturing, and sales facility south of Olympia, Washington, along Old Highway 99.

II

On March 8, 1984, approximately 100 gallons of a liquid labeled FOC-50 spilled to interior drains in the CH_2O building. Most of the spill collected in a central sump and then drained to a holding tank outside the building. CH_2O employees pumped some of the FOC-50 out of the holding tank, but the pump broke preventing complete recovery. The lid on the holding tank was left off allowing rainwater to enter. As a result of exceedingly heavy rain March 12, 1985, and a broken downspout, approximately 50 gallons of FOC-50 overflowed the holding tank and was carried overland by rainwater to the storm water ditch in front of the facility.

III

CH_2O personnel did not report this spill to the Department of Ecology (DOE) or to any local authorities. The Company's executive

director testified that he and other employees were unaware that the spill had occurred until apprised of the fact on March 15, 1984, by DOE's inspector.

DOE's inspector arrived on March 15 in response to a citizen's complaint. The complaint related to a strong smell emanating from CH_2O's ditch. The complainant was fearful that whatever had been dumped in the ditch might contaminate his water well across the road from CH_2O's facility.

DOE's inspector could distinctly detect the smell from across the road and upon looking in the ditch observed a milky bluish red material there. The company's executive director was contacted and the material in the ditch was pointed out to him. He advised the inspector of the FOC-50 spill inside the building and said this might be some of the same material.

The ditch in front of CH_2O where the material was discovered is clearly visible and employees pass it daily coming and going from work. We find that CH_2O either knew or should have known about the spill to the outdoor environment several days before it was brought to their attention by DOE.

IV

While at the site DOE's inspector took water samples from the ditch. He also obtained from the company a description of the constituents of FOC-50. With this information, he did a so-called "book designation" of the material and classified it as extremely hazardous waste.

Analysis of the samples confirmed that the material detected in the ditch was, indeed, FOC-50 and, subsequent bioassay work confirmed the appropriateness of the EHW designation.

FOC-50 is an additive to boiler fuels which, at the time, CH_2O was blending at their plant and then selling. It is highly toxic.

V

The DOE orally requested that CH_2O retain a geohydrological firm to perform a remedial investigation. Because there are a number of water supply wells located in the immediate area, residents within 1,000 feet of the plant were advised to stop using their well water, and CH_2O began supplying them with drinking water. A vacuum truck was used to remove all the standing water and FOC-50 in the ditch. Approximately 5,000 gallons were removed and stored on site.

VI

Early monitoring of existing wells revealed no contamination from FOC-50. However, DOE personnel remained fearful of delayed effects from material that might have migrated into the soils. Their initial impression was that the soil in the area was highly porous and a substantial public health danger was feared.

VII

On March 30, 1984, the DOE issued Order DE 84-221 requiring CH_2O to (1) hire a qualified geohydrologist to evaluate the impacts of the spill; (2) define ground water direction; (3) develop a data base for establishing the range of soil contamination; (4) develop and implement a sampling program for domestic water supplies in the area;

and (5) submit an investigation and report by May 14, 1984.

VIII

On May 11, 1984, Applied Geotechnology, Inc., submitted a report entitled "Ground Water Contamination Investigation, CH_2O Facility, Thurston County Washington" to comply with the May 14, 1984, deadline required by item 5 of DOE Order DE 84-221.

The results reached in this report were; (1) no ground water contamination occurred; (2) initial soil test results indicated that contamination from the spill was limited to the immediate area of the ditch; (3) no soil contamination was found outside the area; (4) no POC-50 constituents were detected in ground water samples collected from local water supply wells or from the monitoring wells installed during their study; and (5) the soil underlying the admittedly contaminated layer in the bottom of the ditch contains levels of contaminants well below the lower limit threshold for designation as a dangerous waste.

IX

DOE remained concerned that a potential public health threat existed and that the work done for CH_2O did not provide an adequate basis for a cessation of remedial action. On June 25, 1984, the DOE responded by letter to appellant concerning the May 11, 1985, report. The letter indicated that although the report complied with DOE Order DE 84-221, it did not contain sufficient information to support the report's conclusion and recommendations. Therefore, the letter indicated that a more stringent clean-up program would be required and

that a new order would soon be issued to accomplish that result.

X

On July 11, 1985, DOE issued another order for corrective action, Order No. DE 84-416, requiring CH_2O to perform a number of tasks.

DE 84-416 in relevant part reads:

> IT IS ORDERED THAT CH_2O, Inc. shall, upon receipt of this Order, take appropriate action in accordance with the following instructions:
>
> A. All remaining remedial action (site cleanup, designation of spill wastes, submissions per this order, etc.) be under the direct supervision of a qualified geohydrologist or professional engineer who has demonstrated experience in hazardous waste remedial action cleanups.
>
> B. By July 20, 1984, the following shall be accomplished:
>
> 1. Submit an approvable plan to dispose or recycle all heretofore generated wastes. Wastes from well MW3 must be designated per the "Criteria;" other drilling muds may be disposed of on site. Spill material originally pumped from the ditch may be phase separated and the FOC-50 repackaged as product, as long as this product can be certified that it meets original specifications. Otherwise, it, along with the other phases, must be designated per the "Criteria."
>
> 2. Submit an approvable plan to implement the detailed requirements of C. and D., below.
>
> C. By August 3, 1984, the following shall be accomplished:
> 1. Properly remove and/or reuse all currently stored wastes accumulated on or before the date of the spill. If designation has not been completed by this time, transport and store wastes at a permitted site, following all applicable WAC 173-303 requirements.
>
> 2. Excavate all soil around the spill tanks and,

within the brick enclosure, excavate to one foot below the tanks. This shall be done in two steps: remove and store the top two feet of soil; then remove all the rest. Store each lift separately and in a manner to prevent further leaching or migration of this solid waste until proper disposal is approved.

3. Excavate, to a depth of one foot, all surfaces of the front (west site of facility) ditch in which the spill occurred. Store this material per C.2., above.

4. Excavate the remaining contaminated soils in the front ditch, to a depth of 8.5 feet, and increase the width of excavation two feet per each foot of depth (one foot to either side of ditch center line). Store this material per C.2.; above. Overburden may be stockpiled for later fillings.

5. Auger holes shall be made at the bottom of the excavation on five-foot centers to a depth of five feet for additional field sampling and testing. Field sampling equipment shall be capable of measuring trace amounts of chlorinated hydrocarbons and benzenes (e.g., the HNU). If detectable values are found in a hole, that quadrant shall be excavated and another two auger holes installed at its bottom. Twenty-five percent of all augered holes shall have cores sampled in the laboratory to verify field results. At the end of the field sampling, the auger holes shall be filled with bentonite slurry.

6. Excavate, by hand, portions of the side ditch (south side of facility) that were covered after the spill. This section shall be excavated to within one-half foot of the original ditch bottom and sides. Then excavate, to a depth of one and one-half foot, all surfaces of the side ditch from the front ditch to the southeastern corner of the building. Store this material per C.2., above. Overburden may be stockpiled.

7. Excavate the remaining contaminated soil from the side ditch as in C.4., above, except taper the excavation from 8.5 feet at the

west end to one foot at the east end. Augering shall also be done per C.5.

At this point, there should be at least seven separate waste piles that are secured from run-on, runoff, and other migration problems. The front and side ditches are to be backfilled using similar native soil and brought up to original grade, all after field samples are verified.

D. By August 27, 1984, the following shall be accomplished:

1. Using the "criteria," designate all waste piles accumulated during the excavation phase.

2. Properly manifest and dispose of all designated soils at a permitted facility. Soils that are not designated, but do have toxic properties or contain toxic substances, must be properly solidified (to prevent leaching) before being disposed of at a landfill that has an unconfined aquifer below it, or alternately disposed of at a landfill with a leachate collection system. Additionally, the county health department must approve of the material's disposal.

3. Install, or have access to, a monitoring well directly west of the spill ditch in the proximity of the nearest domestic well. Begin monitoring as follows:

a. Record static water level elevation (tied to project datum) monthly between November and May, and also for August.

b. Using approved sampling techniques, monitor quarterly for:

-Phenol (using EPA method 604);
-Naphthlene;
-TOX;
-Chlorinated Hydrocarbons (method 612);
-Purgable Aromatics (method 602)

The monitoring route will continue for two years.

XI

On July 18, 1984, DOE issued Order DE 84-415, Notice of Penalty Incurred and Due, assessing $10,000 for the spill of FOC-50 in mid-March.

DOE Order DE 84-415 in relevant part reads:

> This penalty is assessed in two parts: A) Five thousand dollars ($5,000) for violation of WAC 173-303-145, Spills and Discharges to the Environment. CH_2O, Inc. spilled an EHW and failed to notify the department or any local authority of the spill. B) Five thousand dollars ($5,000) for the combined violations of RCW 90.48.080, WAC 173-303-060, WAC 173-303-070, WAC 173-303-140, and WAC 173-303-170. CH_2O, Inc. spilled an EHW to the ground potentially polluting the ground water, waters of the state, (RCW 98.48.080). CH_2O, Inc. generates an EHW, however, the waste has not yet been notified, identified, or designated, (WAC 173-303-060 and 070). CH_2O, Inc. disposed of the waste to an unauthorized facility within this state, (WAC 173-303-140). CH_2O, Inc. generates an EHW, however has not complied with any generator requirements.

XII

On July 20, 1984, appellant feeling aggrieved by DOE corrective action Order DE 84-416, appealed to this Board which appeal became our number PCHB 84-182.

XIII

On July 27, 1984, appellant applied to the Department for remission or mitigation of the $10,000 penalty contained in DOE Order DE 84-415.

XIV

On August 20, 1984, the parties participated in a settlement conference with a member of the Pollution Control Hearings Board. As

a result, the parties entered into a stipulation for further remedial steps. They agreed to; (1) excavate the area near the storm water drainage ditch and store the material in a manner that prevents leaching or migration of the soil until the proper disposal mechanism is determined and approved by WDOE; (3) test the excavated soil and liquid and (3) install a ground water monitoring well across Old Highway 99 in a location designated by DOE.

XV

Thereafter, over a period of time the company and the agency continued to squabble over details of how the remedial work was progressing. CH_2O felt that it was proceeding in conformance with the stipulation. DOE believed the stipulation was not being adhered to. Questions about how clean the soil must be and the precise placement of monitoring wells were discussed. But matters dragged on through the fall of 1984 and into the winter and spring of 1985.

XVI

On April 22, 1985, the Department of Ecology ruled on CH_2O's application for remission or mitigation of the penalty. The agency denied relief and affirmed the full $10,000 penalty.

XVII

On April 26, 1985, appellant feeling aggrieved by the Department's decision appealed to this Board, which appeal became our cause number PCHB 85-66.

XVIII

The results of the ongoing discussions were finally memorialized

in a new stipulation signed on July 2, 1985. This document set forth detailed requirements for ground water and soil sampling and provided for subsequent definitive identification of ultimate clean up levels.

The stipulation included a list of specific removal levels required to be met by DOE's "How Clean is Clean" policy where technically and economically feasible.

The agreement provided for reporting to this Hearings Board on completion of various steps, with dismissal of the appeal of the corrective order, DE 84-416, to follow the conclusion of all remedial action.

XIX

CH_2O does not, as a general proposition, either generate, transport, store or dispose of dangerous wastes. On August 20, 1985, the DOE, upon analysis of the wastes the company routinely generates, advised that such wastes should be categorized as "undesignated wastes."

FOC-50, as formerly marketed by the company, was not normally a waste, but rather a product in commerce. However, this material became a waste when it was allowed to escape to the outdoor environment. Accordingly, on a one-time basis, related to the spill episode only, CH_2O became a generator of dangerous wastes.

XX

On August 26, 1985, the day before the hearing in this case, Applied Geotechnology, Inc., submitted a report entitled "Soil and Ground Water Consultation Services, CH_2O Facility, Olympia,

Washington." The report dealt essentially with the results of the soil and ground water contamination analysis completed subsequent to September, 1984.

The stated overall results were that all detected soil and ground water contaminants were at concentrations below the clean-up standards from DOE's "How Clean is Clean" policy included in the July 2, 1985, stipulation.

XXI

Christopher Thompson, executive director of CH_2O testified that this was the first violation of this sort for the company and that it was an accident; that the company had spent approximately $165,000 for remedial corrective actions and agreed to spend an additional $48,000 to $64,000 to monitor water wells for two years; that they have disconnected the drain pipe to the storage tanks so that a spill of this type cannot happen in the future; and that they have discontinued handling FOC-50.

XXII

Up to the present, no contamination of drinking water has been found as a result of the spill at issue. Whether further monitoring will reveal such effects cannot now be said. However, the potential for damage to the public health, if not totally eliminated, has been substantially diminished by clean-up efforts.

XXIII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. Chapters 43.21B, 90.48 and 70.105 RCW.

II

RCW 90.48.080 Entitled "Discharge of Polluting Matter in Waters Prohibited" reads as follows:

> It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the commissions, as provided for in this chapter. (Emphasis added.)

The definition of "pollution" refers to alterations in the properties of waters "as will or is likely to" render such waters injurious to people or other living things. The definition of "waters of the state" includes underground waters and all surface waters and water courses within the state. RCW 90.48.020.

Given the nature of the material spilled and the character of the neighborhood, we conclude the discharge at issue was "likely to" render the waters harmful and thus, was an event which would "tend to cause pollution." Further, we conclude that the waters in and under the ditch to which the spill migrated were "waters of the state" within the statutory definition. Therefore, we hold that a violation of RCW 90.48.080 occurred.

III

As to causation, the spill cannot be explained away as an act of God. Along with the rain, the company's failure to replace the holding tank lid, the lack of a functioning pump and the failure to maintain the downspout combined to produce the result. We hold that the statute imposes strict liability and that CH_2O is responsible for the spill. The company did "cause, permit or suffer" the discharge in violation of RCW 90.48.080.

IV

Chapter 70.105 RCW is the state hazardous waste disposal statute. RCW 70.105.050 makes unlawful the disposal of "designated extremely hazardous waste" except at an approved site or processing facility.

Chapter 173-303 WAC implements the hazardous waste statute. WAC 173-303-140 essentially restates the statutory prohibition on unauthorized disposal.

We conclude that this regulatory section was violated by the spill at issue. Again, this law establishes a strict liability standard and we hold that CH_2O was the responsible party.

V

WAC 173-303-145 entitled "Spills and Discharges into the Environment" in pertinent part reads:

> (1) Purpose and applicability. This section sets forth the requirements for any person responsible for a spill or discharge into the environment, except when such release is otherwise permitted under state or federal law. This section shall apply when any dangerous waste, or when any material having the properties of a dangerous waste, as described in WAC 173-303-080 through 173-303-103,

> is intentionally or accidentally spilled or discharged into the environment (unless otherwise permitted) such that public health or the environment are threatened, regardless of the quantity of material or the quantity exclusion limits for dangerous waste.
>
> (2) Notification. Any person who is responsible for a nonpermitted spill or discharge shall immediately notify the individuals and authorities described for the following situations:
>
> (a) For spills or discharges onto the ground or into ground water or surface water, notify all local authorities in accordance with the local emergency plan. If necessary, check with the local emergency service coordinator and the fire department to determine all notification responsibilities under the local emergency plan. Also, notify the appropriate regional office of the department of ecology;....

The term "dangerous waste" includes "extremely hazardous waste." WAC 173-303-040(18). We conclude that a nonpermitted spill of a dangerous waste (FOC-50) did occur sometime between March 8 and March 15, 1984, and that appellant, as the responsible party, failed to notify the proper authorities as provided by WAC 173-303-145.

We are not persuaded by CH_2O's claim of ignorance of the occurrence. The evidence was there for all to see and smell. Neither the complainant neighbor nor DOE's inspector had any trouble detecting the spill. CH_2O should have been aware of it. Indeed, the in-plant FOC-50 spill and the pump problems should have put them on the alert.

VI

The failure to notify is, we believe, a serious violation. When spills of dangerous wastes occur, no one has the hind-sight of such detailed studies as have been performed here. Action must be taken quickly in light of the reasonably perceived risks. When substances

which present hazards not fully known are unexpectedly introduced into an imperfectly understood physical environment, the earliest possible notification of events (such as the spill in this case) is necessary in order to protect the public health.

VII

WAC 173-303-060 requires any person who generates a dangerous waste to get a government identification number. WAC 173-303-070 requires generators of dangerous wastes to designate the wastes they generate according to various criteria for evaluating the degree of hazard presented. WAC 173-303-170 sets forth general requirements for generators including the designation function.

CH_2O is asserted to have violated these sections of the regulation (as well as the spill prohibition and notice requirements) and, because in this single instance the company generated dangerous waste, it does stand in technical violation of these provisions under a strict reading of the applicable definitions. We so hold, although we believe these sections were primarily designed to regulate those who commonly and deliberately generate dangerous wastes, not those who do so on a one-time basis because of an upset in their system. Indeed, there appears here to be an attempt to add on a number of peripheral violations, unrelated to the conduct which is really of concern to the agency.

VIII

In sum, we conclude that CH_2O violated each of the statutory and regulatory provisions which for the basis for the corrective order (DE

84-416) and the civil penalty (DE 84-415).

The various stipulations (and actions pursuant thereto) appear, in large measure, to have rendered moot the earlier dispute over the terms of the corrective order. Nonetheless, we conclude the issuance of such an order was proper. RCW 70.105.095. That section authorizes corrective orders "whenever on the basis of any information the department determines that a person has violated or is about to violate any provision of this chapter."

IX

Because the violations did in fact occur, the imposition of a civil penalty was lawful under both RCW 90.48.144 and 70.105.080. The former of these authorizes penalties of up to $5,000 per day for each violation. The latter, penalties of up to $10,000 per day for each violation.

X

In determining the amount of the penalty which should be sustained against the appellant, the surrounding facts and circumstances are relevant. Factors bearing on reasonableness must be considered. These may include:

(a) The nature of the violation

(b) The prior actions of the violator; and

(c) Actions taken to solve the problem.

XI

On consideration of these matters, we sustain in full the penalty ($5,000) assessed for failure to notify the DOE or other authorities.

We regard this as a critically important provision of the whole dangerous waste regulatory scheme. Everyone who handles materials which may pose hazards if allowed to escape into the environment should be sensitive to the risks and quick to let the authorities know when an accident occurs.

XII

As to the spill itself, however, we feel that the penalty should be reduced. No harm to ground water uses or human health and safety or to the well-being of other aspects of the environment has been shown. This company has no prior record of violating the hazardous waste or water pollution laws and has discontinued handling the liquid that spilled. It has also taken steps to insure that another spill could not leave the building. The only waste the company routinely generates has been classified as "undesignated waste" by the DOE.

The company has spent approximately $165,000 to solve the problem caused by the spill and has committed to spend another $48,000 to $64,000 to monitor the local water wells for two years.

Three of the five sections cited in relation to the spill itself were violated only technically, not in a manner which warrants a penalty. The purpose of the civil penalty provisions is not primarily to punish but to secure compliance.

Under all the circumstances of this case, including the company's efforts to solve the problem, we conclude that the statutory objective of the penalty will be adequately served by the order set forth below.

XIII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this

ORDER

Washington State Department of Ecology Order DE 84-416 is affirmed. The $5,000 penalty assessed for violation of WAC 173-303-145 (failure to notify) in Washington State Department of Ecology Order DE 84-415 is affirmed; $1,000 of the $5,000 assessed for water pollution violations and other dangerous waste violations is affirmed. The remaining $4,000 is vacated.

DATED this 31st day of December, 1985.

POLLUTION CONTROL HEARINGS BOARD

12/31/85

LAWRENCE J. FAUEK, Chairman

GAYLE ROTHROCK, Vice Chairman

WICK DUFFORD, Lawyer Member